Supreme Court of the United States

No. 26

RESPONDENT'S PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 26.

THE UNITED STATES,

Petitioner,

v.

MISSISSIPPI VALLEY GENERATING COMPANY,
On Its Own Behalf and To the Use of Others,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

RESPONDENT'S PETITION FOR REHEARING.

This petition for rehearing is based upon two points:

1. A legal point which for the first time at any stage in this litigation was raised in the Government's reply brief, served upon us less than two days before the argument and never briefed or argued by us, but which appears to have been adopted in the majority opinion; and

2. The serious misconceptions of fact on which the majority opinion is based.

I.

The opinion is based upon an important point of law which has not been briefed or argued by us.

Throughout this litigation prior to the service of its reply brief, the Government contended that if Wenzell violated 18 U. S. C. 434 the contract was absolutely void and unenforceable by respondent. We briefed and argued the case on the assumption that that was the issue. However, in the last four pages of its reply brief, which was served upon us less than two days before the oral argument, the Government for the first time advanced the proposition that the contract was merely voidable. As we read the Court's opinion, it has taken the same view: "The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest" (Op. p. 43).

Unfortunately, the Government's change of position escaped our attention while we were preparing for the oral argument, or we would have requested leave to file a brief in reply. For this approach changes the entire basis of the controversy and raises an issue the implications of which are of grave and far-reaching public importance: can the Government disaffirm this contract when, after disclosure of Wenzell's position and his removal, it proceeded with the negotiation and subsequent execution of the contract, and insisted upon contract performance as long as performance was deemed advantageous to the Government? Hasn't the Government thereby affirmed the contract? We respectfully ask the Court to order rehearing on this issue. In support thereof, we show as follows:

A.

Prior to the Government's Reply Brief, the Case was Presented and Argued on the Theory That the Government Had Refused to Pay under the Contract on the Ground That It Was Void, and not on the Theory That the Government Had Exercised a Right of Election to Disaffirm a Voidable Contract.

The origin of this lawsuit was the opinion of the General Counsel of the AEC on November 15, 1955, that, after reviewing the facts, "My conclusion is that there is a substantial question as to the *validity* of the contract which can only be settled in the courts" (F. 128, R. 118), followed shortly thereafter by a letter to respondent by the AEC stating "that upon the advice of its counsel, it had concluded that the contract was not an obligation which *could be* recognized by the Government" (F. 20, R. 56).*

The obvious import of that action is that the Government was not purporting to exercise a right of election to disaffirm the contract. It was acting on the assumption that the Government had no choice in the matter: If the contract was not a valid obligation of the Government it would be unlawful to pay out any Government funds under it.

That Government counsel so construed the Government's action is apparent from its briefs. Thus in the Court of Claims the Government stated that the question presented was whether Wenzell's activities "constituted such a conflict of interest as to avoid the contract" (Def. Br., p. 2).** Similarly in its principal brief to this Court, the Government stated the "Question Presented" as follows: "The ultimate question presented is whether the contract is a

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* Emphasis added here and throughout this petition unless otherwise indicated.

** All four opinions in the Court of Claims deal with the question of whether the contract is void and contain no mention of the possibility that it was merely voidable.

valid obligation and enforceable against the United States" (Pet. Br., p. 2). In support thereof the Government argued that "The contract which followed from the transactions in which Wenzell participated is unenforceable under the policy of 18 U. S. C. 434" (Pet. Br., p. 67).

In our principal brief we argued that while concededly a contract involving a conflict of interest would be void as against the wrongdoer (here, under the Court's decision, Wenzell or First Boston), public policy did not require that the same rule be applied when the principal contractor had no conflict of interest and the wrongdoer would not profit by enforcement of the contract, particularly where the contractor disclosed the possibility of the conflict and brought about the wrongdoer's removal (Resp. Br., pp. 67-83). We did not argue the point presented in this petition.

B.

The Government's Belated Change of Position.

In reexamining the Government's reply brief in the light of the Court's opinion, we note that for the first time the Solicitor General abandoned his former position and conceded that there was a distinction between the rights of the wrongdoer and those of the contractor. Thus, at page 36, after stating that "Under the statute, the Government has a clear power to disaffirm because of the conflict of interest," the Solicitor General cites *City of Findlay* v. *Pertz*, 66 Fed. 427 (6th Cir. 1895), in support of the proposition that while the contract would be void as to the wrongdoer, it would be merely voidable as to the principal contractor, when it was not itself involved in the conflict.

In that case, a municipal purchasing agent had received secret commissions from the contractor's salesman on all

goods purchased by him for the city. As the Solicitor General pointed out: "In the suit which followed, the Sixth Circuit distinguished between the contract of purchase, which was legitimate on its face, and the employee's commission arrangement, which was absolutely void. Noting that '[t]he means by which the city may have been induced to enter into it [the contract] was the vicious element in the trade' (66 Fed. at 436), the court held that, in view of the violation of the statute, the city might repudiate or affirm the contract as it should elect" (Pet. Reply Br., pp. 36-37) (Interpolations in Pet. Reply Br.).

After arguing that, under the cases, the "right of disaffirmance" is "a common principle," the reply brief concludes: "Under the clear policy of 18 U. S. C. 434, the United States had every right to disaffirm when all the facts were known to the contracting party. Under the facts of this case, it was under a duty to do so" (Pet. Reply Br., p. 39).

Evidently, since we did not reply to this new contention, the Court was left with the impression that the contract had been duly disaffirmed by the Government upon discovery of Wenzell's position, and that consequently the only issues were (1) whether Wenzell had violated 18 U. S. C. 434, and (2) whether such violation rendered the contract voidable as to respondent: "The question is whether the Government may disaffirm a contract which is infected by an illegal conflict of interest."

If that had been the issue tendered in the Government's principal brief, we would have conceded the point as a matter of law,* and argued first (as we did) that there had

* Moreover, if that is the issue, the legal arguments which we made in pages 61-91 of our principal brief are irrelevant and meaningless, since they are directed solely at the contention that the contract is absolutely void.

been no conflict, and secondly (as we did not) that in any event the responsible executive officials of the Government, from the President down, instead of disaffirming the contract had repeatedly affirmed it with full knowledge of Wenzell's activities. For on this record, if the contract is voidable, the issue is whether or not the Government has affirmed or disaffirmed. Moreover, in passing upon that issue, the very factual considerations which were held irrelevant in determining whether Wenzell had violated Section 434 are of primary importance.

For example, there is no doubt that, since this Court has held that Wenzell violated Section 434, neither he nor First Boston could recover anything under this contract. As to them it is absolutely void. And this would be so regardless of such questions as good faith, disclosure to his superiors, approval of his continuance as a consultant by his superiors, fairness of the contract, or any other equitable considerations. Obviously, no Government official can waive the provisions of the statute any more than equitable considerations can exempt a violator from its effects. Nor have we ever contended otherwise. As we pointed out in our principal brief, pp. 71-72, *Rankin* v. *United States*, 98 Ct. Cl. 357 (1943), and *Curved Electrotype Plate Co.* v. *United States*, 50 Ct. Cl. 258 (1915), clearly establish that one who has violated Section 434 cannot profit from the enforcement of a contract he negotiated or authorized on behalf of the Government, whatever equitable considerations may be advanced in his favor.

But on the question whether the Government has exercised its election to affirm or disaffirm the contract, those very equitable considerations are of primary importance. Can the Government disaffirm this contract when, after the contractor itself disclosed Wenzell's position and brought about his removal, the Government proceeded with the

negotiation and execution of the contract and insisted upon its performance as long as continued performance was desired by it, even after the charge of conflict of interest had been publicly made? That question has never been briefed or argued. Yet, as the Court's opinion stands, it holds that the Government may disaffirm under precisely those circumstances. The implications of such a decision are of such public importance that it should be fully briefed and argued before it becomes finally imbedded in our law.

C.

If the Contract is Voidable Rather Than Void, New Issues of Grave Public Importance are Presented.

The basic nature of the distinction between a determination that, as to respondent, this contract is voidable, rather than void, is well illustrated by the action taken on the floor of the Senate on this very issue, when the several statutes directed at conflicts of interest were first enacted. Some eight months before the predecessor of 18 U. S. C. 434 was adopted, the Senate Judiciary Committee's version of what is now 18 U. S. C. 216, the so-called "bribery statute," was being debated on the floor of the Senate. As reported out, the Section provided that "Every such contract or agreement, as aforesaid [*i.e.*, obtained by bribery] shall moreover be absolutely null and void." Addressing himself to this provision, Senator Fessenden of Maine spoke as follows:

> "I would suggest an amendment that I think would be advisable. It may be that a contract or agreement procured in this way may be a valuable contract for the Government, and I would therefore suggest an amendment in the sixteenth and seventeenth lines, so as to make it read, 'and the President is hereby authorized to declare such contract or

> agreement to be absolutely null and void.' Let the Government avail itself of it if it so pleases. I suggest to the Senator from Kentucky whether it would not be advisable to leave it at the option of the Government" (Cong. Globe, 37th Cong., 2d Sess., p. 2958 [June 27, 1862]).

After some debate this amendment was adopted in the following form: "Any such contract or agreement, as aforesaid, may, at the option of the President of the United States, be declared absolutely null and void'" (*Ibid.*).

It is not reasonable to contend, as did the Government in the court below and in its principal brief to this Court, that public policy requires the court to import into the companion statute, now 18 U. S. C. 434, which is silent on the question of contract enforceability, the very provision which Congress rejected on grounds of public policy when enacting the statute directed at the more serious offense of bribery (see Resp. Br., p. 64). It is far more appropriate that, since the Court has held that a "sanction of unenforceability" is to be imported into the statute, it should be cast in terms of voidability, rather than in terms of outright invalidation.

That this is not an antiquated view is apparent from the current report of the distinguished Special Committee of the Association of the Bar of the City of New York on the Federal Conflict of Interest Laws, recently published under the title "Conflict of Interest and Federal Service" (Harvard University Press, 1960). After an exhaustive review of the entire subject, the report annexes a proposed new statute designed to deal with the problem.* Section 12(e) of that proposed statute reads as follows:

* This proposed statute is now pending before Congress: S. 607, H. R. 3050, 87th Cong., 1st Sess. (1961).

"SEC. 12(c) *Rescission of Government action.*

The President or any agency head may cancel or rescind any Government action without contractual liability to the United States where

(1) he has found that a violation of this Act has substantially influenced such Government action; and

(2) in his judgment the interests of the United States so require under all of the circumstances, including the position of innocent third parties."

The Committee's report adds the following comment: "Subsection (c) provides a statutory base for the common law principles of rescission" (*Id.* at 302).

According to *Restatement of Contracts*, Section 483, the common law principles of rescission applicable to the situation at bar are as follows:

"483. Loss of Power of Avoidance by Failure to Notify the Other Party.

(1) The power of avoidance for fraud or misrepresentation is lost if after acquiring knowledge thereof the injured party unreasonably delays manifesting to the other party his intention to avoid the transaction.

(2) In determining the unreasonableness of delay the following circumstances are influential:

(a) the speculative character of the contract whereby prolongation of the power to affirm or to avoid would give an advantage to the injured party or increase the loss of the other party;

(b) the likelihood that the party guilty of the fraud or misrepresentation will materially change his position, *or the welfare of a third person be unjustly prejudiced by delay*;

(c) the fact that change of position by the party guilty of the fraud or misrepresentation, *or prejudice to a third person, has in fact occurred during a period of delay in manifestation of intention.*"

As this Court stated the rule in *Shappirio* v. *Goldberg*, 192 U. S. 232, 242:

> "It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone, and the party will be held bound by the contract."

To the same effect, see *City of Findlay* v. *Pertz*, *supra*, 66 Fed. at 439-40.

The same rule is applicable to contracts of the United States. For example, in *Reading Steel Casting Co.* v. *United States*, 268 U. S. 186, the Government was not permitted to disaffirm a contract of sale for alleged imperfections when it had neither inspected the goods nor rejected them within a reasonable time. As this Court pointed out in that case (268 U. S. at 188): "The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. *Smoot's Case*, 15 Wall. 36, 47; *Manufacturing Company* v. *United States*, 17 Wall. 592, 595; *United States* v. *Smith*, 94 U. S. 214, 217."

As Mr. Justice Brandeis said, writing for a unanimous Court in *Lynch* v. *United States*, 292 U. S. 571, 579: "When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

There is a substantial difference between the exercise of a right of election to disaffirm a voidable contract and a refusal to perform the contract on the ground that it is void and unenforceable: the latter involves no act of volition and no exercise of discretion. Nor can any equitable considerations be considered. The issue is exclusively for judicial determination: if the contract is void as a matter of law, it can not be enforced regardless of whether or not the Government wishes to enforce it.

On the other hand, the question of whether to affirm or disaffirm a voidable contract is purely a matter for the executive branch. The only question subject to judicial inquiry is whether and in what manner the right of election may have been exercised. Moreover, in the judicial determination whether the right to affirm or disaffirm has been exercised, the very equitable considerations which this Court has held irrelevant in determining whether Section 434 has been violated become of primary importance. Concededly if the contract is void as a matter of law under the provisions of 18 U. S. C. 434, not even the President could waive the statute and render the contract valid. But there can be no doubt that if the contract is voidable the executive branch can affirm or disaffirm, and neither the wisdom nor reasonableness of its action is subject to review.

On three separate occasions the Government, acting through its highest executive officials, including the President himself, was confronted with the necessity of either affirming or disaffirming the contract, and in fact affirmed it on each occasion: (i) the negotiation and execution of the contract after the sponsors' disclosure of Wenzell's position and his removal from the Government for that very reason; (ii) the Government's insistence upon prompt performance of the contract for nearly five months after

Wenzell's position was concededly known to everyone in the Government concerned with the contract; and (iii) the action of the President after the cancellation of the contract in directing the negotiation of an agreement on termination costs.

Thus even if the Government's action in repudiating the contract on November 23, 1954, on the ground that it "was not an obligation which could be recognized by the Government" (F. 20, R. 56) could be construed as an exercise of the Government's right of election to disaffirm, it came too late. The Government had repeatedly taken actions to affirm.

D.

The President Directed Negotiation and Execution of the Contract After Disclosure of Wenzell's Position and the Termination of his Government Services.

As the Court of Claims found, "On April 24, 1954, Hughes [then Director of the Bureau of the Budget] sent the President a memorandum, reporting the results of the analysis [of the second proposal] and recommending that the Budget Bureau be authorized to instruct AEC to proceed to complete arrangements for a contract with the sponsors. * * *" (F. 129, R. 119). Again on June 14, 1954, a comparative summary analysis of costs under the sponsors' proposal and other similar proposals "was presented by Hughes and Strauss to congressional leaders in conference with the President. At that time the President stated that AEC would be instructed to proceed with negotiations under the sponsors' proposal for the purpose of entering into a definitive contract within the terms of the proposal. * * * On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, directing AEC to proceed with negotiations with the sponsors, with

a view to signing a definitive contract on a basis generally within the terms of the proposal * * *" (F. 130, R. 119).

By April 24, 1934, Hughes knew substantially all the facts which the Court has now held rendered the contract voidable; that Wenzell was a Vice President of First Boston (F. 69, R. 85); that he had been disturbed lest some impropriety might be charged if he continued his services to the Bureau, contract negotiations should be authorized, and First Boston should be retained as financial adviser to the sponsors (F. 69, R. 85); that Wenzell's own lawyers, as well as Dixon, were equally disturbed over this possibility and had advised Wenzell to resign immediately (F. 78, R. 92); that, while Dodge had agreed with Hughes that there was no immediate problem, Dodge had advised Wenzell to terminate his services as quickly as possible if there was any likelihood that First Boston would become involved (F. 85, R. 95);* that thereafter he himself had directed Wenzell to turn everything over to Adams of the FPC (F. 92, R. 99); that Wenzell had done so on March 23rd and had attended only one more Budget Bureau meeting as a consultant, on April 3rd, on which day his services ended (F. 106, R. 106); that Wenzell's only contribution to the sponsors' second proposal, which was to form the basis of the contract negotiations which Hughes recommended,

* At the time Wenzell spoke to Hughes and Dodge, their opinion was that no violation of 18 U. S. C. 434 had occurred and no serious problem was presented, since a long time would elapse before contract negotiations would commence and any question of financing would arise (Fs. 69, 85, R. 85, 95). Their opinion can hardly be deemed to be unreasonable, since six of the fourteen Judges who have passed on this case have come to the same conclusion. Similarly James, when he raised the point of Wenzell's position with Dixon and subsequently with Hughes, and Arthur Dean, counsel for First Boston, when he told Wenzell to resign immediately, felt that no violation of Section 434 had taken place (Fs. 68, 72, R. 84, 87); and the same reasonableness must be attributed to their views.

had been to reaffirm his estimate of the probable cost of money (Fs. 95, 97, R. 100-01); and that, on April 10th, immediately prior to the time the sponsors submitted their second proposal, it had been agreed between Dixon and Nichols, general manager of the AEC, that only the actual cost of money, and not Wenzell's estimate, would be binding on either party (F. 102, R. 103-04). Thus, even if the reasonableness of the action taken by the President on the recommendation of his own appointee were subject to judicial review, the record shows that it was quite reasonable for Hughes to have determined, on the basis of these facts, that Wenzell's former involvement presented no obstacle to his recommendation that contract negotiations be instituted.

The Court's opinion makes much of the fact that Hughes did not know of the retention of First Boston in late April or May, because Wenzell did not fulfill his promise to Dodge (or follow the instructions that he had received from First Boston's counsel) to disclose the retention of First Boston to the Bureau of the Budget. However, the record discloses that at the very first meeting between respondent's representatives and representatives of the Government after the retention of First Boston, *respondent's representatives* did inform the Government representatives of that fact (Fs. 126, 133, R. 117, 120).

To be sure, at that time, since contract negotiations were about to be commenced, respondent was dealing with the AEC and not the Budget Bureau, for the negotiation of the contract was not a function of the Budget Bureau (F. 45, R. 70). Moreover, it appears that the AEC may not have passed on this information to the Budget Bureau (F. 127, R. 118).* But we question whether a contractor

* It has not been suggested, and there is no evidence, that respondent's representatives were aware of Wenzell's promise to disclose this fact to the Bureau.

who is dealing with the Government and makes full disclosure of pertinent facts to the Government officials with whom he is dealing, can be held to account because those officials did not pass on the information to other interested officials or agencies.*

But in any event, as Hughes knew, the express reason why Dodge advised Wenzell to terminate his services as soon as possible, was the "likelihood that First Boston might participate in any financing which developed in the future" (F. 85, R. 95). Since, as this Court points out (Op. p. 38), it was the existence of that "likelihood," and not the subsequent retainer of First Boston, which rendered the contract voidable, it is difficult to see the significance for present purposes of the fact that First Boston was in fact retained.

When a prospective Government contractor calls the attention of the agency head with whom he is dealing to the fact that one of the agency's consultants may in the future find himself in a position involving a conflict of interest, the consultant is thereupon removed, both parties agree not to be bound by the advice he has given (F. 102, R. 103-04), and the responsible agency head thereafter recommends the initiation of contract negotiations (F. 129, R. 119), the Government cannot thereafter disaffirm the resulting contract because of the consultant's participation in the earlier discussions. On the contrary, under such circumstances the Government will have affirmed the resulting contract.

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* The same question is raised by the Court's reliance on the fact that while at the time the sponsors were dealing primarily with the Bureau, for whom Wenzell was acting, they informed the Bureau of his position, but apparently no one separately advised the AEC (although the record discloses that Williams and Cook of the AEC were aware of Wenzell's situation) (F. 126, R. 117).

Certainly, at common law and between private parties, such actions would preclude the allegedly "injured party" from later disaffirming. We perceive no public policy which would require a different rule when the Government is engaging in contract negotiations with *private parties* who are not themselves involved in a conflict of interest. As this Court has said, "* * * the principles which govern inquiries as to the conduct of individuals, in respect to their contracts, are equally applicable where the United States are a party" (*United States* v. *Smith*, 94 U. S. 214, 217).

The enormous extent to which almost every phase of Government activity, in its many manifestations, from national defense to federal aid, is carried out by private contractors, is subject to judicial notice by the Court. The Court can also take judicial notice of the fact that in a Government establishment employing over 2.4 million civilians in various capacities, many of them recruited from the business community, in addition to a slightly larger number in the armed forces,* it is inevitable that Government contracting officers will be repeatedly confronted with situations involving an actual or potential conflict of interest—particularly in the preliminary and exploratory phases which generally, as here, precede actual contract negotiations.**

What, then, are either the private contractor or the Government contracting officer to do when confronted with such a situation? At common law, the answer is well settled: Upon disclosure of the problem, remove the potential offender, reexamine or disregard any advice he may have given, and proceed to negotiate a contract. And that is precisely what the regulations of the three governmental

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*"Conflict of Interest and Federal Service", *supra*, p. 8.

** See *id.* at pp. 121-80 for an illuminating discussion of this problem.

departments and agencies here involved (Budget, Atomic Energy, and Justice) prescribe.* Yet as we read this Court's opinion, when the Government is negotiating a contract, that procedure is ineffective and the departmental regulations meaningless: at any time in the future, regardless of disclosure, removal of the offending person, mutual agreement not to be bound by whatever he did, and insistence by the Government upon continued performance, the contract could be disaffirmed by the Government whenever it wished to be relieved of its contractual obligations.

Surely the Court did not intend to establish a rule which would present such an insuperable obstacle to anyone contemplating a contract with the Government. For the obstacle *is* insuperable; in a case such as this, where the contractor must borrow large sums of money to finance performance of the contract, the problem has no solution under the majority opinion. The record in this very case shows what lending institutions require in this regard. For example, Exhibit D to the 3⅝% Bond Purchase Agreement dated April 21, 1955, which was entered into in identical form with Metropolitan Life Insurance Company and New York Life Insurance Company (Pl. Ex. 43), sets forth the opinions which the bond purchasers would have demanded of counsel for Mississippi Valley Generating Company and of their own counsel before any loan would have been made. Those opinions would have had to provide that certain agreements, including the Power Contract, "are *valid agreements* duly authorized, executed and delivered by the respective parties thereto, are in full force and effect * * * and are *legally enforceable in accordance with their respective terms.*"

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* See our principal brief, pp. 84-85. Moreover, it is what the revised Conflict of Interest statute recommended by the Special Committee on the Federal Conflict of Interest Laws expressly recommended. "Conflict of Interest and Federal Service", *supra*, pp. 245, 302.

The foregoing is the usual type of requirement in a financing transaction. The officers of institutional lenders are in a fiduciary position and would be derelict if they lent sums of money on the basis of security which might turn out to be illusory. Similarly, underwriters would be derelict and chargeable if they represented as security something which might be made to disappear at the option of the Government.

Thus, under the majority decision, Government contracts which have heretofore enjoyed unsurpassed integrity as security for financing transactions suddenly find themselves virtual South Sea Bubbles. The only way to avoid this result would be for this Court, upon reconsideration, to reestablish the usual rule which has heretofore been applicable at common law: where the existence of a potential conflict is called to the attention of the party who might be injured, and that party takes reasonable action to protect itself from any resulting damage and thereafter proceeds with the negotiation and execution of a contract, the contract can no longer be disaffirmed because of the alleged potential conflict.

E.

The Government Demanded and Obtained Performance of the Contract For Nearly Five Months After All Government Officials Associated With the Contract, From the President Down, Had Knowledge of the Charges Against Wenzell, and Cancelled the Contract Only When, Owing to the Fortuitous Intervention of the City of Memphis, the Government No Longer Desired Further Performance.

Even if there were any significance to the fact that during the time of contract negotiations the AEC did not know as much about Wenzell as did the Bureau of the Budget, and *vice versa*, the record discloses that in Decem-

ber, 1954, the AEC learned that "Wenzell, while serving as a consultant to the Budget Bureau, had been meeting with and supplying information to the sponsors regarding the project." (F. 126, R. 117), and the Bureau of the Budget learned of First Boston's retention not later than February 18, 1955 (Op. p. 25) (F. 127, R. 118). Moreover, as the Court points out, on the latter date "Senator Lister Hill of Alabama made a speech criticizing the activities of Wenzell and First Boston and emphasizing Wenzell's conflict of interest" (Op. p. 24). Nevertheless, the Government continued to insist upon expeditious performance of the contract by respondent for some five months thereafter, and did not cancel the contract until July 11, 1955 (F. 19, R. 55) when, because the City of Memphis undertook to produce its own power, "the power to be generated by the proposed plant was no longer needed" (Op. p. 2).

Moreover, on March 17, 1955, Hughes, who by that time knew everything that was to be known regarding the activities of Wenzell and First Boston, wrote Vogel of the TVA, in reply to a request from two TVA directors that the Budget Bureau reconsider the advantages of the Dixon-Yates contract as compared with the discarded Fulton plant, "that the Dixon-Yates contract was then in effect; that it would accomplish the purposes set forth in the President's budget message; and that there was no reason for exploring other methods to provide additional generating plants for TVA * * *" (F. 158, R. 150).

In May of 1955 the Government filed a brief *amicus curiae* in support of the validity of the contract with the Court of Appeals for the District of Columbia on the appeal from the S. E. C. order approving respondent's equity financing for the performance of this contract, in which it stated that "the power contract was negotiated, executed,

and has been administered with an extraordinary measure of disclosure to the Congress and the public" (Pl. Ex. 28, p. xi).

It is plain from the foregoing that the Government, with full knowledge of all the circumstances, manifested an intention to perform the contract as long as performance was advantageous to it.

Nor is this action surprising, when it is borne in mind that the purpose of the enterprise was to aid in carrying out the Government's declared policy to eliminate all possible expense items so as to achieve a balanced budget, and that the Chairman of the AEC had publicly stated on December 17, 1954, that:

> "The contract with the Mississippi Valley Generating Company is reasonable and fair to the Government and therefore to the American taxpayer. It avoids an immediate appropriation of $100 million tax dollars for the construction of an additional steam plant for TVA * * *" (Def. Ex. 219A, pp. 21, 22).

The Chairman reaffirmed this on the trial of this case (Tr. 1476). Hughes testified to the same effect (Pl. Ex. 148, pp. 14-20). Moreover, the Solicitor General has expressly conceded that "the final contract with respondent turned out to be fair and honest" (Pet. Br., p. 59).

Thus, the situation was precisely that which Senator Fessenden foresaw when he moved the substitution of "voidable" for "absolutely void" at the time the bribery statute was enacted: "It may be that a contract or agreement procured in this way may be a valuable contract for the Government * * *. Let the Government avail itself of it if it so pleases." It is inconceivable that the contract would ever have been disaffirmed because of Wenzell's

activities if such a disaffirmance would have required the addition to the Budget of an item of over $100,000,000 for the construction of the plant at Government expense. This is apparent from the testimony of the Chairman of the AEC before the Kefauver Committee on December 5, 1955, after the contract had been repudiated on the ground that it was void, and only eight days before the filing of the complaint in this case. After reiterating his belief that "the contract was a good contract" he added "I thought so at the beginning, I still think so, despite the fact that in the public interest the President has decided that Memphis is to get its power by local financing, and that he ordered us to bring the contract to an end * * * *and despite the fact that the conflict-of-interest question has been raised* * * *.*" *Power Policy—Dixon-Yates Contract*, Hearings before the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, United States Senate, 84th Congr., 1st Sess., p. 1156 (1955).

Again, the Government with full knowledge of the charge of conflict of interest, was confronted with the choice of whether to continue to exact performance from respondent or disaffirm the contract, and the Government continued to exact performance. It thereby affirmed the contract, if it had not already done so.

F.

Even After the Contract Was Cancelled Because It Was No Longer Needed, the President Directed the AEC to Seek an Agreement With Respondent as to the Amount Due for Termination of the Contract, Subject Only to Whether the Contract Was Void.

Finally, the findings show that even after the President determined to cancel the contract "because in the interim the City of Memphis had decided to construct a

municipal power plant, thereby obviating the need in that area for TVA generated power" (Op. p. 10), not only the Chairman of the AEC but the President himself directed that negotiations be instituted looking towards an agreement as to how the termination of the contract should be carried out, subject only to the reservation of "the question of whether the contract was valid" (F. 21, R. 56):

> "19. On July 11, 1955, at about 5 p. m., plaintiff was advised by telephone by the Chairman of AEC that the President of the United States had decided to order termination of the contract. On August 1, 1955, the oral notice was confirmed in a letter from AEC to plaintiff. *The letter expressed the hope that it would be possible for the parties to agree on a mutually acceptable basis for bringing the contract to an end.*
>
> "20. On July 12, 1955, representatives of plaintiff met with the President of the United States, and thereafter there was a series of meetings with representatives of AEC.* In compliance with a request from AEC, plaintiff supplied estimates of termination costs * * *. The post-termination discussions were broken off by AEC in October 1955, and on November 23, 1955, AEC wrote plaintiff that upon the advice of its counsel, it had concluded that the contract was not an obligation which could be recognized by the Government" (Fs. 19, 20, R. 55-56).

After the President's meeting with respondent's representatives* on July 12th the White House issued the following statement:

> "* * * The President stated that he hoped that in the termination of the so-called Dixon-Yates con-

* It was Mr. Dixon and one of his associates who were invited to the White House to meet with the President, who greeted Mr. Dixon by stating, "I am glad to see a man that can take it on the chin like I think I can" (Tr. 126).

> tract the best interest of the community and the government will be served but that at the same time no injustice will be done to the Mississippi Valley Generating Company. He said that the so-called Dixon-Yates contract was a good, fair agreement, and he praised the good will with which the company officials have accepted the government decision to terminate it—a decision predicated on Memphis', announced plan to build its own steam generating plant and meet its own power needs" (Pl. Ex. 144).

There can be no question but that everyone in the Government, including the President, was fully aware of the possible existence of a defense of conflict of interest at this time. Yet the only action taken was that "at the meetings between plaintiff and the AEC after the contract had been terminated, AEC reserved the question of whether the contract was invalid because of a conflict of interest" (F. 21, R. 56). The only reasonable construction that can be placed upon the Government's action in continuing to negotiate termination costs under such a limited reservation, is that the Government intended to pay respondent's termination costs unless it was prohibited from doing so as a matter of law because of the invalidity of the contract.

Under all the circumstances here present, it is unthinkable that the President would have tried to disaffirm, even if he had been advised that he had a choice in the matter. He would have been guided by the following considerations: Respondent had engaged in this enterprise at the express request of the President's own appointees, the Director and Deputy Director of the Budget and the Chairman of the AEC, in order to carry out a policy which he himself had announced and espoused because he believed it was in the public interest (Fs. 22, 36, 37-39, R. 56-57, 63-64, 64-67). It was his own appointees who had brought Wenzell into

the situation (Fs. 45-46, R. 70-71), and the alleged "taint" in the contract arose solely because those appointees had urged Wenzell to disregard the advice of the respondent's representatives and his own counsel that he resign immediately (Fs. 68, 69, 72, 78, 85, R. 84-85, 86, 88, 91-92, 94-95). The costs incurred by respondent had been incurred at the express request of his own appointees*, and for the purpose of carrying out his own policy of eliminating an item of over $100,000,000 from the Budget (Fs. 22, 23, 36, R. 56-57, 63). As a result of their efforts in executing and performing the contract, until the fortuitous intervention of a third party obviated its necessity, that policy had been accomplished (F. 206, R. 192-193). Moreover, as is apparent from the above-quoted press release, he agreed with his appointees in both the AEC and the Bureau of the Budget (and with the position taken by the Government in its brief [Pet. Br., p. 59]) that the contract was fair and honest and a good contract from the standpoint of the United States. Finally, since the cancellation provisions of the contract provided only for repayment of respondent's out-of-pocket costs incurred in performance of the contract prior to its cancellation, and not for any loss of profits, the President would have known that there could be nothing unconscionable in the amount of the recovery.

While the Court has held that none of these circumstances is relevant in determining whether as a matter of

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* It is to be borne in mind that, with the exception of such inconsequential expenses as may have been incurred in preparing the first proposal of February 23, 1954, all of the expenses included in the judgment below were incurred by respondent and the use-plaintiffs as a result of the Government's action in insisting upon the negotiation, execution and performance of the contract, after respondent had disclosed Wenzell's position to his Government superiors.

law the contract is voidable, there can be no doubt that they are highly relevant to a determination by the President as to whether or not to exercise his right to disaffirm. Moreover, the President's above-quoted statement shows that at least some of these considerations were in his mind when he directed that an attempt be made to reach agreement between the respondent and the Government under the termination provisions of the contract.

In the light of these facts, a decent regard for the reputation of the Government for fair dealing would dictate the action taken by him in directing that steps be taken to repay respondent's out-of-pocket expenses if it were legal to do so. Certainly there is nothing in the record on the basis of which an intention can be imputed to the President deliberately to place himself and the Government in the "far from ingratiating" position (Dissenting Op., p. 1) of welshing on an agreement to reimburse respondent for expenses which he believed had been honestly incurred at his request in order to assist the Government in carrying out a policy which, in his opinion, was in the public interest, simply because he may have had a technical legal right to do so.

Once again, the facts compel the conclusion that the Government, acting by its highest official, when confronted with the choice of affirmance or disaffirmance, and with full knowledge of all the circumstances, unmistakably rejected disaffirmance and took action which can be construed only as an affirmance.

G.

Under the Facts of This Case the Public Policy Embodied in 18 U. S. C. 434 Would Not Be Promoted By Permitting the Government to Disaffirm Without Even Paying Respondent's Out-of-Pocket Costs.

As we understand the majority opinion, public policy requires strict enforcement of 18 U. S. C. 434 for two reasons: first, the *in terrorem* effect of such enforcement as a preventive measure; and second, protection of the Government from the possibility of loss resulting from acts of disloyal public servants.

The *in terrorem* effect, of course, operates against wrongdoers and prospective wrongdoers; and the first purpose mentioned above is therefore completely fulfilled by the Court's unambiguous holding that, under no circumstances and regardless of equitable considerations, can either Wenzell or First Boston profit in any manner from the offending contract.

The second purpose—"to protect the public from the corruption which might lie undetectable beneath the surface of a contract conceived in a tainted transaction" (Op. p. 42)—cannot be served by denying recovery in this case. The amounts allowed to the plaintiff and use plaintiffs by the court below were not fixed by the contract. On the contrary, the reasonableness of those costs was determined by the court itself after extended hearings resulting in findings to which no one excepted.

All that would be recovered under the decision below would be judicially determined costs incurred by respondent at the urging of the AEC in order that respondent might put itself in a position to perform the contract. Therefore, by analogy to *Crocker* v. *United States*, 240 U. S. 74, cited by the majority opinion at page 42, respondent should be permitted to recover its costs. Respondent

is not seeking performance of the contract or damages for breach. It is not seeking anything which could have been affected by Wenzell.

Under these circumstances, from the standpoint of the Government's reputation for common fairness in its business dealings, it would be in the public interest to permit such costs to be recovered. As this Court observed many years ago in commenting upon an attempt by the State of Arkansas to impair its contract obligations:

> "We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals." *Woodruff v. Trapnall*, 10 How. 190, 207.

II.

The majority opinion is based upon an erroneous conception of controlling facts.

The facts as found have not been excepted to or contested. The majority opinion states its reliance upon the findings of Commissioner Cowen, which were adopted by all judges of the Court of Claims whether majority or dissenting, as follows:

> "Fortunately, it will not be necessary for us to consider the original evidence, since both parties have agreed to rely upon the Court of Claims' findings, and since we also conclude that those findings are sufficient to dispose of the issues presented" (p. 4).

Nevertheless, with the greatest respect, we must point out that the majority opinion is premised upon basic misconceptions of both the letter and spirit of the findings.

The contrast between the opinion and the findings is perhaps most clearly demonstrated by Appendix A hereto. Some of the more fundamental errors are discussed below.

A.

The Majority Opinion Misconceives the Nature of the "Cost of Money" Information Which Was Secured Through Wenzell, Among Others; and Couples This Misconception With the Statement, Basic to the Opinion, That the Sponsors and the Government Then "Agreed" on the Cost of Money —a Statement Flatly Contradicted by the Findings.

After stating that "the preliminary negotiations with which Wenzell was concerned dealt primarily with the cost of the project, and particularly with the 'all-important matter of the cost of interest on money that would be borrowed to finance the construction of the plant,'" the majority opinion continues: "*If the sponsors and the Government had not agreed* on the cost of construction and *on the cost of money*, no contract would have been made, because the cost of power supplied to the AEC was to have been based upon both of those factors" (p. 31).

The findings precisely contradict the foregoing statement. Referring to a meeting of April 10th after Wenzell had left the Government and before the commencement of negotiations between the AEC and respondent, the findings say:

> "During the meeting, Dixon said that the best informed judgment which the sponsors had been able to obtain indicated that the interest charges on the debt money would be 3½ percent, but he further stated that if it developed that the sponsors had to pay a higher rate, he would expect the Government to reimburse the sponsors for the additional interest costs. On the other hand, Nichols [General Manager of the AEC] took the position that if the actual cost

of money to the sponsors was less than 3½ percent, he would expect to reopen the question of costs so that the Government would obtain the benefit of the lower rate.

"The cost of money, to which both Dixon and Nichols referred, is not a static figure, but varies from day to day, and sometimes from hour to hour in accordance with the ups and downs of the market. As will hereinafter appear, the actual cost of the money borrowed was 3⅝ percent for MVG's bonds and 3¼ percent for its notes" (F. 102, R. 103-04; see also F. 114, R. 112).*

As the court below accurately stated, the "cost of money" information was such that "A few well placed telephone calls by any responsible person would probably have obtained such information" (R. 12-13).

We concede that the cost of money—the *actual* cost, not *estimated* cost—is of paramount importance with respect to an enterprise such as a power plant, in which capital costs represent so large a portion of the consumer's bill.

Actual money costs are not determined, however, until bonds are sold or a contract for their sale is made. The interest cost is then determined, not by any prior estimate, but by the forces of a competitive market place where money is the thing dealt in.

Nevertheless, before negotiations of the power contract could be initiated, the parties had to postulate an interest rate on the debt portion of the financing so that various formulas could be worked out. It was also necessary that each of the parties know what figure was to be used for this purpose. Such figure was to be used tentatively by

* The overall interest cost for respondent's debt securities would have been 3.58% under its contract with the insurance companies and bankers (F. 114, R. 112).

both sides, however, with the express understanding that when and if the necessary debt financing was agreed upon with lenders, the actual interest rate payable thereon, not the estimated rate, would be determinative of any contract provisions based on the interest cost (F. 102, R. 103-04). It is true that both parties sought to obtain from Wenzell an estimate of the interest rate for this purpose.* It is also true, however, that both parties wanted to have the estimated rate as realistic as possible.

Suppose that Hughes, instead of calling in Wenzell, had had some prior acquaintance with Dixon and had said to him: "You have connections in the financial community. Why don't you find out what a good, realistic estimate would be, based upon present market conditions, of the probable interest cost of the debt portion of an OVEC-type capitalization for this enterprise?" We can then both use that figure as the estimated interest rate in considering formulas for such a contract, with the understanding, of course, that it will be the actual interest rate finally granted by the lenders, not the estimated rate, which must be determinative of the related provisions of any contract. In other words, until the actual interest rate has been determined with the lenders, neither party will be bound."

In such case would the contract be thrown out for conflict of interest? Would Dixon be deemed to be "negotiating" on behalf of the Government? Surely not. Such situations, in which one party to a transaction relies upon another to secure for both objective, factual information, are commonplaces of the market. No one questions them in the slightest in the conduct of day-to-day business.

* The majority opinion fails to note that estimates were also sought from other investment bankers and officers of institutional investors (other than First Boston) (Fs. 62, 101; R. 79, 103).

In the case just given Dixon would have a direct, immediate and easily observable "conflict" with the Government so far as the overall transaction is concerned. Yet it is quite apparent that the "conflict" would not touch the area of the activity he engaged in at the request of Hughes; it would not touch the securing for both sides of objective, factual information in which both sides had a common interest and the effect of which, in any event, would be binding upon neither side but would be subject to adjustment by subsequent mutual agreement in the light of the actual interest rates granted by the lenders.

And if what Dixon was assumed to do in the case just given would not void the contract, how can it be said that having the same thing done by Wenzell, whose interest is indirect and remote, even under the reasoning of the majority opinion, results in a void or voidable bargain? The contract should be upheld *a fortiori*.

The indisputable fact is that, until the contract was signed on November 11, 1954, the sponsors and the Government never did agree "on the cost of money," as the majority opinion states. The erroneous impression, evidenced in the majority opinion regarding the nature of the "cost of money" estimates, together with the basic but erroneous premise that the parties, by tentatively using those estimates, thereby "agreed * * * on the cost of money," is alone sufficient to require a reconsideration of this case in the interest of simple justice.

B.

Wenzell Was Not "the Real Architect of the Final Contract."

The majority opinion (p. 30) says: "We do not think it would be erroneous to characterize him [Wenzell] as the real architect of the final contract."

Such characterization is erroneous; it is not supported by the findings. The characterization was advanced for the first time in the majority opinion of this Court and goes beyond the charges made by the advocates for the Government. Certainly no such charge was made by any of the Government lawyers who tried the case, who heard and saw Wenzell testify, who themselves put questions to him, and who had every incentive to make such a charge if it were justified by the facts. It is contrary to the findings of Commissioner Cowen and the opinions in the court below; it finds no support even in the dissents.

The detailed undisputed findings were fairly summarized in the opinion of the majority below:

> "Wenzell had substantially nothing to do with the substance of the contract" (R. 13).

That Wenzell was not the architect of the contract in any sense is shown beyond peradventure by the following specific findings:

> "There is no evidence that Wenzell was present at or participated in any of these meetings where the basic cost estimates for the second proposal were prepared" (F. 95, R. 100).
>
> "The sponsors' proposal of April 19, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith and Seal. Wenzell was not present in Washington at any of the sponsors' meetings during which the proposal was drafted" (F. 104, R. 105).
>
> "Wenzell did not participate in any of the negotiating sessions [July 7 to November 11, 1954, with the AEC], and there is no evidence that he consulted

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This also shows the plain error of the majority opinion's reference (p. 32) to "the second proposal, upon which Wenzell had expended so much time and energy . . ."

with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation" (F. 136, R. 122).

Finally, the unimportance of Wenzell is perhaps best shown by the following testimony of General Kenneth D. Nichols, General Manager of the AEC, regarding the very meeting with Wenzell which the majority opinion (p. 17) seems to have considered significant:

> "Q. All right, now, directing your attention to Saturday, April 3, 1954. Do you recall any contact that you had on this matter on that day? A. Checking on various records that exist, I undoubtedly met on that date with Mr. Wenzell, on a Saturday morning. However, I do not recall Mr. Wenzell as an individual, but there is no reason for me to doubt the record, that I did meet with some one as a result of a call from Mr. Hughes.
>
> "Mr. Cook has written up this record.
>
> "And, certainly I recall that there was such a meeting, although being four years ago and actually I have a shorter recollection of it than that, that I had no recollection up until recently that I had ever met with Mr. Wenzell.
>
> "In fact I apparently had him confused with someone else" (Tr. 1492-93).

The Court's opinion with respect to the importance of Wenzell creates a grievously erroneous premise which underlies the entire decision and which requires reexamination.

C.

The Court Misconceives the Difference Between the April 10th Proposal (Which Was Not a Negotiated Document But a Proposal By the Sponsors) and the Power Contract (Which Was the Product of 4½ Months of Most Strenuous Negotiations in Which Wenzell Had No Part Whatever).

The majority opinion demonstrates a misunderstanding or a failure fully to recognize the difference between the April 10th proposal and the contract, and its reliance upon such misconception, in a number of places. It says, for example, that the contract in a general way was within the terms of the proposal (p. 32) without pointing out, as the Court of Claims does, the important differences; it suggests that the negotiations may have been merely "perfunctory" (p. 33), whereas the findings in this case show beyond doubt that they were at the opposite end of the pole from that adjective; it speaks of Wenzell as acceding to the demands of the sponsors (p. 35), and favoring the sponsors (p. 35), with nothing in the record or findings to support such conclusions; and it states many similar misconceptions on pages 29 and 30, winding up with the characterization of Wenzell as "the real architect of the final contract."

We had thought that the findings alone established the difference between the April 10th proposal and the contract, the minor role played by Wenzell with reference to the April 10th proposal, and the lack of any connection between Wenzell and the contract. In that belief we did not deem it necessary to burden the Court with the text of the documents themselves.

In view, however, of the plain and demonstrable misconceptions underlying the majority opinion of the Court in this regard, we now think we are entitled to ask this Court to look at the documents themselves in order to dispel these misconceptions and correct the error to which they

have led. Accordingly, we are filing herewith as Exhibits to this petition a copy of the April 10th proposal (Def. Ex. 28), and a copy of the Power Contract (Pl. Ex. 1) in the form in which it was admitted in evidence in the court below.*

The quotations from Findings 95 and 104 set forth *supra*, page 30, show clearly that Wenzell had nothing to do with either the preparation of the basic cost estimates for the second proposal or the drafting of that proposal. The fact is that the only part of the proposal Wenzell functioned on at all is the first sentence of the penultimate paragraph before the signature—the sentence regarding the belief of the responsible financial specialists that the financing could be arranged under then existing market conditions in such a way as to make a contract based upon the proposal a feasible transaction.

But in addition to Wenzell's minor role with reference to the proposal, we believe that on examination of the contract itself it will be apparent that this is far from a situation in which somebody on behalf of the Government merely looked at the proposal, said "yes," and made a contract. And the findings are quite clear as to this. We quote from the record, pages 120-22:

> "133. The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.
>
> "The AEC's team of negotiators was headed by Cook and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. They were a competent and aggressive staff of negotiators.

* Prior to termination, the Power Contract, together with the Interpretative Memorandum, certain related legal opinions and other documents, were printed in booklet form for use in carrying on operations under the contract. The entire booklet was offered and admitted in evidence.

"The sponsors' team was headed by James and besides representatives from the two sponsoring companies; included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8 persons with a total of 11 people taking part.

"From July 7 through September 17, there were 15 formal sessions for which minutes were kept. In addition, there were informal sessions for which no minutes were made. Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators. The negotiating sessions were lengthy, arduous, and hotly contested. As late as November 19,* 1954, the Government insisted on two new contract provisions, and it was doubtful whether there would be a contract unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase the facilities at any time after three years from the effective date of the contract.

"134. On August 18 Nichols and Hughes wrote the Chairman of the Joint Committee on Atomic Energy, transmitting the sixth proof of the proposed contract dated August 11, 1954, with letters stating that the contract was within the terms of the proposal made by the sponsors on April 10, 1954. In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

* This is a typographical error. The proper date is November 10.

"The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract, as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages.

"Early in October, AEC submitted the proposed contract as then drafted to the Joint Committee on Atomic Energy for consideration. At the same time, AEC furnished the committee a detailed report dated October 7, 1954. This document was prepared by Nichols, the General Chairman of AEC, and gave his understanding of many of the provisions of the contract. In appendix 8 of the report, which is in evidence as defendant's exhibit 223, Nichols listed 25 provisions of the contract which he designated as improvements over the terms and conditions of the proposal and as advantageous to the AEC. In appendix 9, he also set forth a number of items which he characterized as 'major concessions from the Company' which were obtained by AEC in the negotiations. His report also pointed out, however, that AEC had requested four changes in or additions to the proposal and that these were either only partially accepted by the sponsors or were rejected in their entirety.

"435. During the period of negotiations, AEC furnished proofs of the proposed contract from time to time to the Bureau of the Budget, the Federal Power Commission, the TVA, and to other agencies of the Government. Many of the agency suggestions were incorporated in the contract. The suggestions and recommendations of the Budget Bureau were made available informally to Cook. In addition, the Budget Bureau furnished a formal review. Joint meetings were held between AEC and representatives of the Federal Power Commission, which furnished a large amount of basic data. At times,

Federal Power Commission's staff met with the AEC to suggest changes in the proposed contract. Three proofs of the contract were made available to TVA, and after the AEC representatives had met with those of TVA, a number of the TVA suggestions were incorporated verbatim in the contract.

"136. Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he consulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation."

The various statements in the majority opinion regarding the negotiations by Wenzell, his acceding to demands of the sponsors, his participating as an architect of the contract and the like, are not supported by the findings. More important, they are not supported by the record—and that in a record in which the Government had every advantage of proving a case—if a case had existed. Every living person connected with the Government who at any time had anything to do with this matter was available to the Government counsel, and none of those witnesses showed any reluctance. The lack of support for the statements in the majority opinion is therefore doubly significant.

We submit, therefore, that the misconceptions in the majority opinion regarding the difference between the April 10th proposal and the contract, including the lack of any significant function by Wenzell regarding the proposal and of any function at all regarding the contract, and the patent effect on that opinion of such misconceptions, are also, by themselves, sufficient grounds to require reconsideration of this case by this Court.

Conclusion.

Respondent's petition for rehearing should be granted, and upon rehearing, the judgment of the Court of Claims should be affirmed.

Dated: March 3, 1961.

Respectfully submitted,

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Certificate.

The undersigned, counsel for respondent in the foregoing petition for rehearing, hereby certifies that the foregoing petition is presented in good faith and not for delay.

JOHN T. CAHILL.

Appendix A.

Comparison of Statements in Majority Opinion with Facts as Found.*

Opinion	Findings
"Although the findings of fact do not specifically indicate wherein the second proposal differed from the first * * *" (p. 9).	"However, the second proposal differed from the first in several respects. "In the first proposal, the capital cost figures were based on a study which had originally been made for the Mississippi Power & Light Company in connection with an offer it made to TVA. Since that offer related to a plant having 450,000 kw. capacity, the cost figures in the February 25 proposal were adjusted upward to provide for a plant of 600,000 kw. On the other hand, the capital cost figures in the April 10 proposal were based upon estimates prepared by Ebasco for the actual cost of constructing a plant of the desired capacity at West Memphis, Arkansas. "The proposal of February 25 referred to and compared the sponsors' capital cost with TVA's estimated

* Both parties and the Court rely on the findings of fact as stated by the Court of Claims. See Opinion, p. 4.

Opinion	Findings
	costs for the construction of the proposed plant at Fulton, Tennessee, [fol. 402] whereas the April 10 proposal did not mention a comparison of costs with the TVA Fulton plant.
	"In the first proposal, the base capacity charge was stated as $9,626,000, whereas the base capacity charge in the second proposal was $8,775,000.
	"The proposal of February 25 stated that the energy charge and other terms and conditions of the contract, including adjustments, were to be similar to those contained in AEC's contract with TVA for such service, but in the April 10 proposal, the energy charge was stated in specific figures and the terms for the adjustment thereof were set out in some detail" (F. 103, R. 104-05).
"On June 16, 1954, the President authorized AEC to *continue* negotiations with the sponsors * * *" (p. 9).	"On June 16, 1954, letters approved by the President were sent by Hughes to AEC and TVA, *directing AEC to proceed with negotiations* with the sponsors * * *" (F. 130, R. 119). The letter to the sponsors from the AEC said: "We are ready to *begin* negotiations" (F. 131.

Opinion	Findings
	R. 120). "The sponsors' proposal was a firm offer but, as indicated by the quotation above, the AEC letter *was not an acceptance;* it was simply a statement that AEC was ready to *begin contract negotiations.*
	"* * * Shortly after June 30, AEC was advised that the sponsors had prepared a draft of the proposed contract and were ***ready to begin the negotiations.*** In order to have the draft printed and allow the AEC an opportunity to consider it, it was agreed that the *negotiations would begin on July 7, 1954*" (Fs. 131, 132, R. 120).
"He [Wenzell] owned stock in First Boston, although the stock was in his wife's name" (p. 11).	This was 200 shares (F. 125, R. 117) which was 44/1000ths of 1% of the outstanding capital stock of First Boston (*Moody's Banks, Insurance, Real Estate and Investment Trusts* [1954], p. 1141).
"After Wenzell *thought he had found* the answer to Dixon's question [as to probable interest rate on debt portion of an OVEC-type capitalization], he called	Wenzell's first answer was the only answer Dixon asked for and the only answer Wenzell ever gave—the estimate that 3½% was a probable interest rate based on

Opinion	Findings
Dixon and advised him of the information he had acquired from his colleagues at First Boston. During the week that followed, *Wenzell made* further studies and *engrafted certain refinements* onto his calculations. Then, on February 14, 1954, he attended a meeting in Dixon's office and gave Dixon the *new figures* which he had computed" (p. 15).	then market conditions. This answer he never changed. The implication that Wenzell made further studies at the request of Dixon must be compared with F. 59, R. 77-78, which is as follows: "Hughes requested that further studies be made on other forms of capitalization and on different periods for repayment of the debt." So far as the sponsors are concerned Wenzell never "engrafted certain refinements on his calculations." He never made any calculations for the sponsors. He got only an estimate of what the interest rate might be. The statement that he gave Dixon "new figures" must be compared with the finding that "Wenzell gave them the information on interest rates that he had previously obtained from First Boston". (F. 61, R. 79).
"Dixon arranged a meeting with Yates on February 19, and *he* requested Wenzell, who had known Yates for several years, to be present" (p. 15).	"In a telephone conversation prior to the meeting, *Hughes* requested Wenzell to attend as representative of the Budget Bureau." (F. 64, R. 80).

Opinion	Findings
"The information in this letter conformed to the oral opinion which Wenzell had rendered on February 14, 1954. The letter was on First Boston stationery and was signed by Wenzell as an officer of First Boston" (p. 15).	This was not a letter but a mere draft; it was not on First Boston stationery but the draft merely indicated that if and when it should be written, it was intended to be written on First Boston stationery; and it was an unsigned draft bearing no signature of Wenzell or of anyone else on behalf of First Boston (F. 67, R. 82-83, Def. Ex. 22).
"The 'responsible financial specialists' upon which the sponsors relied were Wenzell and his colleagues at First Boston, and the *cost data* upon which they conditioned their proposal was that which was contained in the opinion letter drafted by Wenzell" (p. 16).	It is not accurate to speak of First Boston's estimate of 3½% as the probable interest rate as "cost data". Unlike the elaborate construction and other cost data which were prepared by Ebasco, Southern Services and other persons representing the sponsors, the interest estimate was not considered binding on anybody. See comment on Opinion, p. 31, *infra*. There is also no reference to the fact that the 3½% had been verified by the sponsors not only from First Boston but also from "several investment bankers and officers of institutional investors (other than First Boston)" (F. 62, R. 79).

Opinion	Findings
Referring to discussions on March 1, 1954, the Opinion says: "Hughes was advised that, despite *Wenzell's insight into the problem*, there still remained areas of uncertainty" (p. 16).	There is no support in either the record or the findings for "Wenzell's insight into the problem." It is contrary to F. 74, R. 89, where he stated that he was not qualified to answer power engineering questions and F. 85, R. 95, where he said he was not qualified "on the matter of overall costs."
"Immediately after Hughes made his decision, Wenzell informed Seal that such an analysis was to be made" (p. 16).	Hughes reached an agreement with Nichols and Clapp on March 3, that the AEC and TVA would make a joint analysis of the proposal (F. 80, R. 92-93). Wenzell's meeting with Seal took place the day before, on March 2 (F. 75, R. 90).
"Wenzell saw the letter and made several changes on it *for the sponsors* in his own handwriting" (p. 17).	There is nothing to support the statement that Wenzell made changes for the sponsors, or that he was ever in communication with them regarding this draft letter (F. 90, R. 98).
"*While* Adams was preparing his analysis, the sponsors were working on some revised estimates" (p. 17).	"*After* Adams had made an *independent* analysis of the February 25 proposal on the basis of the material furnished him, Adams, McCandless, and other staff members of the Bureau met with Seal on March 24, 1954, at which time Adams stated

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	that the figures in the proposal were considerably higher than a reasonable estimate of costs to the sponsors. Adams *then* asked Seal to develop basic estimates for the cost of constructing a plant and other facilities to provide the services contemplated in the proposal, and Seal agreed to confer with the sponsors regarding this request" (F. 93, R. 99).
"At the conclusion of the meeting, it was decided that the sponsors should undertake to prepare a new proposal in line with their revised estimates" (p. 17).	"*As a result of Adams' analysis*, it was agreed that the revised cost estimates were better than those contained in the proposal of February 25 but that further refinement of the figures was required. Dixon and Yates were told that if they could submit a new firm proposal close to the revised cost estimate, the Budget Bureau would feel that the new proposal would deserve serious consideration" (F. 97, R. 100).
On page 17 reference is made to the fact that on April 3 Nichols "suggested that Wenzell encourage the sponsors to refine their figures." On page 29, the Opinion says that Wenzell	There is no evidence or finding that Wenzell ever carried out Nichol's suggestion. There is no reference in the majority opinion to the fact which made it most unlikely that he ever did so—that on

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"urged the sponsors to refine their figures after the initial proposal was rejected * * *."	the morning of that very day Dixon and Yates had been told by Hughes, McCandless and Adams in the presence of Wenzell "that further refinement of the figures was required" (F. 97, R. 100).
"The second proposal, like the first, contained a paragraph indicating that the sponsors relied upon Wenzell's advice and conditioned their offer on that advice" (p. 18).	Wenzell's advice should be limited to probable interest costs alone.
"* * * Hughes was aware of most of Wenzell's activities, * * *" (p. 18, ftn. 8).	Wenzell's activities were carried out pursuant to Hughes' directions or instructions (F. 46, R. 71; F. 55, R. 76; F. 59, R. 78; F. 64, R. 80; F. 67, R. 84; and F. 69, R. 85).
"* * * he [Wenzell] had given the sponsors an opinion letter on the probable cost of money * * *" (p. 19).	He had not given an opinion letter; he had prepared a draft, which had not even been cleared with his superior, Linsley (F. 107, R. 107).
"When *in early March 1954*, James learned that Wenzell had not yet resigned, he asked Hughes why Wenzell had been permitted to continue as a consultant to the Bureau" (p. 21).	"*Sometime later in March* 1954, when Dixon and James called on Hughes in Washington on another matter relating to the project, James raised the question of Wenzell's duality with Hughes" (F. 78, R. 92).

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Pages 29 and 30 of the Opinion summarize all the foregoing—as well as many vital omissions not mentioned in the foregoing parallel columns—by referring to Wenzell as "the Government's key 'representative in the crucial preliminary negotiations"; as frequently "the only representative of the Government at important meetings"; as the supplier to the sponsors of "vital information"; as "an advisor on the total cost of the project" with no mention of the findings that he was unable to advise in this area (F. 74, R. 89, F. 85, R. 95); as "the Government's major representative in the formative negotiations of this multi-million dollar contract"; and finally as "the real architect of the final contract."	None of this has any support in the record or findings. See Point II, B and C, of Petition for Rehearing.
"If the sponsors and the Government had not *agreed* on the cost of construction and *on the cost of money*, no contract would have been made * * *" (p. 31).	"During the meeting [on April 10], Dixon said that the best informed judgment which the sponsors had been able to obtain indicated that the interest charges on the debt money would be 3½ percent, but he further stated that if it developed

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	that the sponsors had to pay a higher rate, he would expect the Government to reimburse the sponsors for the additional interest costs. On the other hand, Nichols took the position that if the actual cost of money to the sponsors was less than 3½ percent, he would expect to reopen the question of costs so that the Government would obtain the benefit of the lower rate" (F. 102, R. 103-04). "A few well placed telephone calls by any responsible person would probably have obtained such information [as to probable interest rates in the money market]" (Opinion below, R. 12-13).
"The second proposal, upon which Wenzell had expended so much time and energy * * *" (p. 32).	"Following Adams' suggestion to Seal, a group of executives from Middle South and Southern, together with engineers from Ebasco and Southern, worked from March 26 to about April 1, 1954, on the preparation of detailed cost estimates covering the construction of a power plant at West Memphis, Arkansas. These cost estimates were used as a basis for the sponsors' pro-

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posal of April 10, 1954. *There is no evidence that Wenzell was present at or participated in any of these meetings where the basic cost estimates for the second proposal were prepared*" (F. 95, R. 100).

"The sponsors' proposal of April 10, 1954, was prepared in Washington, D. C., by Dixon, Canaday, Barry, James, Smith, and Seal. *Wenzell was not present in Washington at any of the sponsors' meetings during which the proposal was drafted*" (F. 104, R. 105).

"Although the final contract was slightly different from the second proposal * * *" (p. 9). Also: "* * * the Court of Claims specifically found that '[i]n a general way, the contract was within the terms of the proposal' " (p. 32).

"In a general way, the contract was within the terms of the proposal, but during the negotiating sessions, there were numerous changes in and additions to the terms set forth in the proposal. During the sessions, the representatives of the sponsors frequently referred to the terms of the proposal but were not successful in limiting the consideration of the Government negotiators to the provisions of that instrument.

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"* * * and then to insulate themselves from prosecution under Section 434 by withdrawing from the negotiations at the final, and often *perfunctory* stage of the proceedings" (p. 33).

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"The specific terms contained in the proposal were set forth in an appendix consisting of nine typewritten pages, whereas the Power Contract as finally executed by the parties was a printed document of 49 pages with 10 printed pages of appendices, and an interpretative agreement comprising about 10 printed pages" (F. 134, R. 121).

"The negotiation of the contract began on July 7, 1954, and was concluded with the signing of the contract on November 11, 1954.

"The AEC's team of negotiators was headed by Cook and the number of people on the team varied in different sessions of from 6 to 9, with a total of 14 different people taking part. *They were a competent and aggressive* staff of negotiators.

"The sponsors' team was headed by James, and besides representatives from the two sponsoring companies, included engineers from Ebasco and Southern Services. The sponsors' team varied from 5 to 8

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persons with a total of 11 people taking part.

"From July 7 through September 17, *there were 15 formal sessions* for which minutes were kept. In addition, there were informal sessions for which no minutes were made. *Nine successive proofs of the proposed contract were printed to incorporate revisions tentatively agreed upon by the negotiators.* The negotiating sessions were *lengthy, arduous, and hotly contested.* As late as November 19, 1954, the Government insisted on two new contract provisions, and *it was doubtful whether there would be a contract* unless the sponsors' representatives agreed to these requests. One of the provisions placed a limitation on MVG's earnings under the contract and the other gave the AEC the right to purchase the facilities at any time after three years from the effective date of the contract" (F. 133, R. 120-21).

"Wenzell did not participate in any of the negotiating sessions, and there is no evidence that he con-

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	sulted with or advised any of the sponsors' representatives or any Government representatives during the period of negotiation" (F. 136, R. 122).
"* * * he [Wenzell] was, to say the least, subconsciously tempted to ingratiate himself with the sponsors and to accede to their demands * * *" (p. 35).	There are no findings that the sponsors made any demands upon Wenzell or upon any other representative or agency of the United States.
"That Wenzell, on at least two occasions, brought *senior* officers from First Boston with him to *negotiating* sessions * * *" (p. 36, ftn. 16).	Miller was an assistant in the buying department (F. 49, R. 72), and Robinson was assistant vice president (F. 74, R. 89). Moreover, Robinson was brought only to a staff meeting, with no representative of the sponsors present, which could not possibly be a "negotiating" session.
"There is nothing in the findings to show whether the contract here involved was favorable or unfavorable to the Government" (p. 43, ftn. 20).	The opinion of the Court of Claims says: "The Government concedes that the contract which it seeks to repudiate was an honest one, arrived at after hard and skillful bargaining by representatives of the Government who had complete fidelity to their trust, and which became use-

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less to the Government only because of the intervention of a *force majeure*, the decision of the City of Memphis to generate its own power" (R. 17).

The concession referred to by the court in the foregoing quotation was a concession made by counsel for the Government, in open court, that there was in fact no corruption, fraud, dishonesty or loss to the Government in this case.